

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Snow Covered Capital, LLC,

Case No.: 2:19-cv-00595-JAD-NJK

Plaintiff

V.

William Weidner, et al.,

Defendants

Order Construing and Granting Motion for Reconsideration

[ECF Nos. 170, 173]

Snow Covered Capital, LLC seeks a deficiency judgment against William Weidner,

Andrew Fonfa, David Jacoby, and Lucky Dragon LP after the defendants defaulted on various loans it provided to build and run a new casino.¹ On March 18, 2021, I entered an order that,

11 among other things, determined that discovery into attorneys' fees prior to trial was unwarranted,
12 and I directed the parties to develop a discovery protocol that would permit discovery into Snow
13 Covered Capital's claimed attorneys' fees after my entry of judgment.² Weidner and Jacoby³
14 seek clarification of that order under Federal Rule of Civil Procedure 60(a), querying whether
15 attorneys' fees will be (1) included in the "indebtedness" used to calculate the deficiency, which
16 would need to be presented and proven at trial; or (2) excluded from the calculation of

indebtedness, and thus recoverable only as part of a post-judgment proceeding under Rule 54.⁴ In essence, they question the efficiency of my order, which appears to create a bifurcated trial resolving different aspects of the defendants' alleged indebtedness to Snow Covered Capital.

¹ ECF No. 1 (complaint).

² See ECF No. 169 at 4–7, 9.

³ The Fonfa estate has joined their request. See ECF No. 175.

⁴ ECF Nos. 170, 173. The defendants also request a status conference to discuss the issue. I decline that request because this order clarifies the issues.

1 After reviewing the defendants' briefing and exhibits, I construe their request for
2 clarification as a motion for reconsideration and grant it. Because these recent filings elucidate
3 that determination of indebtedness and any resulting deficiency requires Snow Covered Capital
4 to account for its attorneys' fees, I find that discovery into those fees is warranted pre-judgment.
5 So I direct the parties to file a stipulated scheduling protocol to address pre-trial discovery into
6 those fees.

Discussion

Under Federal Rule of Civil Procedure 60, a court may “relieve a party or its legal representative from a final judgment, order, or proceeding.”⁵ A motion for reconsideration is generally appropriate when the district court is presented with newly discovered evidence or has committed clear error, or there is an intervening change in controlling law.⁶ “A motion for reconsideration is not an avenue to re-litigate the same issues and arguments;”⁷ instead, a party seeking reconsideration must present “facts or law of a strongly convincing nature” that provide a “valid reason” why reconsideration is appropriate.⁸⁹ Weidner and Jacoby present sufficient reasons to warrant reconsideration of my prior order deferring until after judgment any discovery into Snow Covered Capital’s claimed attorneys’ fees.

17 Snow Covered Capital's deficiency action arises under Nevada law, which requires an
18 evidentiary hearing and calculation of the defendants' indebtedness to the creditor.¹⁰ Snow

²⁰||⁵ Fed. R. Civ. P. 60(b).

²¹ *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

⁷ *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005).

²² ⁸ *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003).

23 ||⁹ Fed. R. Civ. P. 60(b).

¹⁰ See Nev. Rev. Stat. §§ 40.457, 40.459.

1 Covered Capital has yet to explain what it will present to satisfy its burden of proving the
2 defendants' indebtedness.¹¹ Despite the lender's silence, however, it would appear that
3 attorneys' fees will be included in that calculation. Not only does Nevada law require an
4 accounting of claimed attorneys' fees in a deficiency action,¹² but Snow Covered Capital appears
5 to concede that it plans to request attorneys' fees as part of its deficiency judgment.¹³ And its
6 contracts seemingly authorize it to do so.¹⁴ Thus, discovery into those attorneys' fees is
7 warranted.

8

9

10

11¹¹ See *First Interstate Bank of Nev. v. Shields*, 730 P.2d 429, 432 (Nev. 1986) ("Since a creditor
12 is entitled to a single satisfaction of an outstanding debt irrespective of the value of its security
and the number and financial strength of primary obligors, sureties, or guarantors, the threshold
13 issue under the legislative scheme is to determine whether, in fact, a deficiency in debt
satisfaction remains after the creditor has sold the real property securing the debt.").

14¹² Nev. Rev. Stat. § 40.451 ("[I]ndebtedness means . . . all costs and fees of such a sale . . . and
15 all other amounts secured by the mortgage or other lien on the real property in favor of the
person seeking the deficiency judgment.").

16¹³ See ECF No. 170-4 at 3 ("This bifurcated approach does not limit or waive SCC's right to seek
recovery of its attorney's fees under any theory or provision allowed by the contracts or by law.
17 It simply defers presentation of the evidence regarding such fees to a separate phase of those
proceedings leading to the final judgment."); 170-6 at 3 ("SCC will present all of the admissible
evidence it has in support of its claims, including its multiple attorney[s'] fees claims.").

18¹⁴ ECF No. 1 at 15 (§§ 1.2, 1.2(d)), 18 (§ 1.8). Section 1.2 of the parties' agreement defines the
"Guaranteed Obligations" to include, in relevant part, "any Losses incurred by Lender arising out
19 of or in connection with" the failure to pay valid taxes on the casino; "legal costs and expenses
(including reasonable attorneys' fees)" that Snow Covered Capital incurs "in connection with
litigation or other legal proceedings involving the collection or enforcement of this Guaranty;" or
20 attorneys' fees "arising from or relating to the filing of a petition under any bankruptcy . . . by or
against Borrower or any Guarantor." *Id.* at 15. The term "Losses" is defined to include "any and
all . . . out-of-pocket costs and expenses (including without limitation reasonable attorneys' fees
21 and expenses)." *Id.* Section 1.8 of the Guaranty Agreement also states that the guaranty
defendants "shall, immediately upon demand by Lender, pay Lender all costs and expenses
(including court costs and reasonable attorneys' fees)" if the "Guarantors should breach or fail to
22 timely perform any provisions of this Guaranty." *Id.* at 18.

Under the Federal Rules, “attorney[s] fees and related expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.”¹⁵

The advisory committee notes indicate that Rule 54’s post-judgment motion requirement “does not apply” to “fees recoverable as an element of damages, as when sought under the terms of a contract” because “such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.”¹⁶ With this recent round of briefing, it has become increasingly apparent that Snow Covered Capital expects to include a claim for those fees in its proof of indebtedness. Thus, under Rule 26, the defendants should be able to “obtain discovery regarding any nonprivileged matter” that is relevant to Snow Covered Capital’s “claim” for a deficiency, so long as that discovery is “proportional to the needs of the case.”¹⁷ So I direct the parties to file a stipulated scheduling order, accounting for any necessary discovery into the attorneys’ fees that Snow Covered Capital claims will be used to calculate the defendants’ indebtedness.

Conclusion

14 IT IS THEREFORE ORDERED that the defendants' motion for clarification [ECF No.
15 **170**] is construed as a motion for reconsideration and **GRANTED**. The portion of my March
16 **18, 2021, order granting in part Snow Covered Capital's motion for entry of a discovery**
17 **protocol [ECF No. 169] is VACATED.**

¹⁵ Fed. R. Civ. P. 54(d)(2)(A).

¹⁶ Fed. R. Civ. P. 54, advisory committee's note.

¹⁷ Fed. R. Civ. P. 26(b)(1); see *Clarke v. Am. Comm. Nat. Bank*, 974 F.2d 127, 130 (9th Cir. 1992) (“Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.”); *ResCap Liquidating Trust v. Home Loan Ctr., Inc.*, 399 F. Supp. 3d 827, 830 (D. Minn. 2019); *United States ex rel. Luke v. HealthSouth Corp.*, No. 2:13-cv-01319, 2020 WL 1169393, at *2–3 (D. Nev. Mar. 11, 2020) (noting that a “district court has discretion in determining what fees are reasonable”).

1 IT IS FURTHER ORDERED that the parties are directed to file a stipulated scheduling
2 order in this matter for the magistrate judge's review by May 17, 2021.

3 IT IS FURTHER ORDERED that the defendants' motion for a status conference [ECF
4 **No. 173] is DENIED.**

5 IT IS FURTHER ORDERED that because the stay has expired, the Clerk of Court is
6 directed to remove the stay designation from this case.

7 
8 U.S. District Judge Jennifer A. Dorsey
9 May 3, 2021

10
11
12
13
14
15
16
17
18
19
20
21
22
23